No. 3087

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CIRO CONNETTO,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF THE DEFENDANT IN ERROR.

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FRANK B. MONCKTON, Clerk.

By....., Deputy Clerk.

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Plaintiff in Error has appealed from the order of the District Court of the United States in and for the Northern District of California made on the 15th day of September, 1917, ordering the removal of Ciro Connetto to the Southern District of Florida, to answer to an indictment charging him jointly with one Alfonzo Connetto with a violation of section 29b (1) of the Bankruptcy Act of 1898. The said order of removal was based upon a certified copy of the indictment (the identity of the defendant Ciro Connetto being admitted), and the sole question raised by this appeal is the sufficiency of the indictment to justify the order of removal based thereon. Counsel for plaintiff in error has advanced two propositions as follows:

1. That where an indictment, which is the sole basis upon which a removal is sought, fails to charge an offense and should be quashed for uncertainty, the District Court has no jurisdiction to permit or to order the removal of a prisoner.

2. The indictment does not charge the plaintiff in error with an offense against the United States and should be quashed for uncertainty.

In reply to the first of these propositions we submit that mere uncertainty in an indictment will not justify a refusal to order a removal thereon, as doubt about an indictment should not be resolved against it in such cases.

In re Belknap, 96 Fed. 614 the Court said:

> "Doubts should not be solved against the indictment in such cases. On the contrary, it seems to me that they should be solved in favor of the removal of the accused, for the reason that the court in which the indictment is pending is entirely competent to determine all questions involved, and can be implicitly relied upon to determine them according to the law and the justice of the case."

Mere technical defects that might be raised on special demurrer, cannot be considered on an application to remove.

U. S. vs. Horner, 44 Fed. 677;

Beavers vs. Henkel, 194 U. S. 73;

Green vs. Henkel, 183 U. S. 249, 260.

It must therefore be conceded that unless the indictment in this case fails entirely to state an offense under the laws of the United States, the order of removal must be affirmed. This brings us to a con-

sideration of the second proposition of counsel for appellant that no offense is stated.

The indictment in this case charges in substance (Tr. p. 6) that Ciro Connetto and Alfonzo Connetto, co-partners trading and doing business as C. Connetto & Brother, filed a voluntary petition in bankruptcy, and that thereafter the said co-partnership was adjudicated bankrupt and that one Maxwell Baxter was duly assigned as trustee for the estate of the said co-partnership; that after the filing of the said petition, and after the said co-partnership had been duly adjudicated a bankrupt, but before the appointment of the said trustee, the said Ciro Connetto and Alfonzo Connetto unlawfully and fraudulently concealed certain property belonging to the estate of the bankrupt co-partnership, and that after the qualification of the said trustee neither Ciro Connetto nor Alfonzo Connetto disclosed to the said trustee their possession of the concealed property, and that neither of them turned over or delivered to him the said property or accounted to him for the same; there is no allegation that either Ciro Connetto or Alfonzo Connetto as an individual was adjudicated bankrupt, and the sole question here is whether a partner who conceals the assets of a bankrupt co-partnership is guilty of a violation of the said Sec. 29b of the Bankruptcy Act which provides that:

> "A person shall be punished, by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and

> fraudulently (1) concealed while a bankrupt, or after his discharge from his trustee, any of the property belonging to his estate in bankruptcy."

Counsel for appellant contend that a partnership is a distinct legal entity within the provisions of the Bankruptcy Act, and that as such it might violate section 29b (1) above, but that the individuals making up such co-partnership may conceal the property of the partnership without rendering themselves subject to the punishment provided by the law.

Counsel rely on *Field vs. U. S.* 137 Fed. 6, decided in the Circuit Court of Appeals for the Eighth Circuit on April 7th, 1905, wherein it was held that the vice-president of a bankrupt corporation, not himself a bankrupt, was not guilty of a violation of section 29b (1) of the bankruptcy act, when he concealed the property of the corporation estate from its trustee in bankruptcy.

The gradual trend of the decisions of the courts since the Field case was decided has been away from this holding. In *Cohen v. U. S.* 157 Fed. 651, decided in the Circuit Court of Appeals for the Second Circuit on November 7th, 1907, it was held that an indictment will lie against individuals for conspiring to cause a corporation to commit the offense made punishable by Section 29b (1) of the Bankruptcy Act.

In *U. S. vs. Young & Holland Co.,* 170 Fed. 110, decided in the Circuit Court of Rhode Island, May 5th, 1909, it was held that "although section 29b re-

quires as a principal offender a bankrupt, it is applicable not only to a bankrupt, but also to all persons who unite with the bankrupt in the act which is made an offense by the statute."

Attention is directed in this opinion, to Chap. 1, Sec. 1, subdivision 19 of the Act which provides: "'Persons' shall include corporations, except where otherwise specified, and officers, partnerships, and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling bodies of corporations." The opinion continues: "The term 'participants in the forbidden acts' seems an appropriate expression designed to cover persons who join with a bankrupt in the commission of the offenses created by Chap. 4, Sec. 29, and framed in view of the rule that those who are present, aiding, commanding, or abetting, are deemed principals." The court then calls attention to section 332 Criminal Code of the United States, enacted March 4, 1909, and subsequent to the decisions in the Field and Cohen cases, and which reads: "Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal," saying: "This section apparently is declaratory of the existing rule."

In *Kaufman v. U. S.* 212 Fed. 613, it was held by the Circuit Court of Appeals for the Second Circuit that one may be guilty of aiding and abetting a bankrupt corporation in the concealment of its assets, the defendant having been indicted as a principal under section 332 of the Criminal Code.

In *U. S. vs. Freed,* 179 Fed. 236, decided in the Circuit Court for the Southern District of New York on April 23rd, 1910, the court said in overruling a demurrer and denying motion to quash an indictment charging Freed with causing the bankrupt corporation of which he was president to conceal its property from its trustee: "The crime of concealing assets could be committeed by a corporation, and Freed could be indicted for the offense if he participated in its commission. *Cohen v. U. S.* 157, Fed. 651; *U. S. v. Young & Holland Co.,* 170 Fed. 110. Those were cases of conspiracy; but if one may be guilty of conspiring to commit an act, it cannot be that he is not guilty if the conspiracy is accomplished. I do not regard *Field vs. U. S.* 137 Fed. 6, as binding after *Cohen v. U. S.* supra."

The most recent case on this subject is *Wolf v. U. S.* 238 Fed. 902, decided in the Circuit Court of Appeals for the Fourth Circuit on November 16, 1916. In this case two brothers, who were, respectively, the president and secretary-treasurer of a bankrupt corporation, were convicted of concealing the property of the corporation in violation of section 29b of the

Bankruptcy Act. The validity of the indictments was attacked on the theory advanced in the instant case, that the crime of concealing property, as defined by the above section, can be committed only by a bankrupt; and as neither of the brothers was bankrupt as an individual, they were immune from prosecution. The Court said:

> "The contention is not without merit or the support of judicial opinion. *United States v. Lake* (D. C.) 129 Fed. 499; *Field v. United States,* 137 Fed. 6, 69 C. C. A. 568. The Supreme Court also, in *United States v. Rabinowich,* 238 U. S. 78, 35 Sup. Ct. 682, 59 L. Ed. 1211, said that the question 'is at least doubtful', and refrained from deciding it. The contrary view is held in *United States v. Young & Holland Co.* (C. C.) 170 Fed. 110, where the subject is fully discussed and a number of decisions cited. See, also *Cohen v. United States,* 157 Fed. 651, 85 C. C. A. 113; *United States v. Freed* (C. C.) 179 Fed. 236; *Roukous v. U. S.* 195 Fed. 353, 115 C. C. A. 255; *Kaufman v. United States* 212 Fed. 613, 129 C. C. A. 149, Ann. Cas. 1916C, 466; and the opinion of the learned district judge overruling the demurrers in this case. We are better satisfied with the reasoning of these later cases, and therefore disposed to follow them until the question is otherwise decided by the court of last resort. Besides, we think the indictments should be sustained, under the authorities just cited, on the counts charging the defendants with aiding and abetting the concealment of the bankrupt's property."

From the foregoing authorities it is apparent that the members of a partnership may be charged with

a violation of section 29b (1) of the Bankruptcy Act, and that the indictment in the present case is valid.

Counsel for appellant have raised an additional objection to the indictment in this case, to wit, that it does not charge a concealment of the property in question from the trustee after his appointment and qualification. They concede that if the concealment, though effected before the appointment of the trustee, continue after his appointment there is a concealment within the terms of the statute. But that the language here used, that "before the appointment and qualification of said Maxwell Baxter as trustee * * * the said Ciro Connetto and Alfonzo Connetto unlawfully and fraudulently did conceal certain property * * * and after the qualification of said Maxwell Baxter as trustee * * * the said Ciro Connetto and Alfonzo Connetto have not, nor has either of them disclosed to the said Maxwell Baxter the possession by them * * * of the said merchandise above described, and did not and have not turned over and delivered to the said Maxwell Baxter, trustee and aforesaid, the said merchandise * * * or accounted to him for the same * * * and that no accounting has up to this date been made to the said Maxwell Baxter", they contend is insufficient to charge a continuing concealment.

We believe this contention to be without merit; though more apt language may have been found to express a continuing concealment, in the absence of a

special demurrer, this defect, if such it be, does not justify a reversal of the order of removal.

As to the contention of counsel for plaintiff in error that as the indictment fails to allege the value of the property concealed and is therefor insufficient, we submit that where as here, the value of the property does not constitute an element of the offense, no allegation of value is necessary; furthermore, that the property is sufficiently described to justify an inference that it has value, and if it has none, that is a matter of defense and not an essential element of the offense necessary to be set forth in an indictment under section 29b (1) of the Bankruptcy Act.

Respectfully submitted,

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Asst. United States Attorney,

Attorneys for Defendant in Error.